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IN THE
SUPREME COURT OF THE UNITED STATES

CENTRAL LABORERS' PENSION FUND,

Petitioner,

v.

THOMAS E. HEINZ and RICHARD J. SCHMITT, JR.,

Respondents.

On Writ of Certiorari To The United States Court of Appeals For the Seventh Circuit

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF RESPONDENTS

MARY ELLEN SIGNORILLE*
AARP FOUNDATION LITIGATION

MELVIN RADOWITZ
AARP

601 E Street, NW
Washington, DC 20049
(202) 434-2060

Counsel for *Amicus Curiae* AARP
*Counsel of Record

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BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*[1]

AARP, a nonpartisan nonprofit membership organization of over 35 million persons, age 50 or older, working or retired, is dedicated to addressing the needs and

[1] No counsel for any party authored any portion of this brief. No persons other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief. The parties have filed letters with the Clerk expressing their blanket consent to the filing of amicus briefs.

interests of older Americans. Almost half of AARP's members are working. AARP seeks through education, advocacy, and service to enhance the quality of life for all by promoting independence, dignity and purpose.[2/] In its efforts to promote independence, AARP works to foster the economic security of individuals as they age by attempting to ensure the availability, security, equity, and adequacy of public and private pension, health, disability and other employee benefits.

AARP's members and other participants in private employer-sponsored employee benefit plans rely on the Employee Retirement Income Security Act (ERISA) to protect their rights. 29 U.S.C. § 1001 *et seq*. It is crucial that participants be able to rely on the pension benefits that have been promised to them and which they have earned because the quality of their lives in retirement depends heavily on their eligibility for and the amount of their pensions. Participants must know that once they have begun receiving pension benefits that these benefits cannot be taken away. Thus, application of plan amendments tightening suspension of benefit rules to those participants who are already receiving their pension benefits, not only will negatively impact their retirement security, but may leave them with little or no time in which to make up any shortfall.

[2/] As part of its advocacy efforts to ensure, to the greatest extent possible, that participants and beneficiaries receive the benefit of ERISA's protections, AARP has participated as *amicus curiae*, both jointly and singly, in numerous ERISA cases including those involving ERISA § 204(g). *See, e.g., Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002); *Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238 (2000); *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993); *Varity Corp. v. Howe*, 516 U.S. 489 (1996); *Bellas v. CBS, Inc.*, 221 F.3d 517 (3d Cir. 2000).

Because this case will have a direct bearing on the economic security of millions of Americans, including AARP members, AARP respectfully submits this brief *amicus curiae*.

SUMMARY OF ARGUMENT

The issue before the Court in this case is very narrow – may a pension plan tighten its suspension of benefits rule limiting where participants may work after retirement and apply this new rule to those participants who are already in pay status. AARP submits that the answer to this question must be no.

If plans are permitted to change eligibility rules for pension benefits, such as limiting where participants may work after retirement, and apply those new rules to participants in pay status, the impact on those participants will be significant. Permitting plans to limit when and where individuals may work after they are already in pay status makes meaningful retirement planning impossible. Significantly, such plan amendments fly in the face of workers' expectations and labor force trends indicating that more individuals are staying in the work force after they "retire." Moreover, although Congress permitted plan sponsors to amend their pension plans, Congress circumscribed such amendments by restricting how and when they can be applied to participants. Congress did not differentiate between multiemployer and single employer pension plans in these restrictions on applying plan amendments to those participants in pay status. For these reasons, the decision of the Seventh Circuit should be affirmed.

ARGUMENT

I. IF PENSION PLANS CAN CHANGE THEIR RULES FOR RECEIPT OF PENSION BENEFITS RETROACTIVELY, NO EMPLOYEE WILL EVER BE ABLE TO MEANINGFULLY PLAN FOR RETIREMENT.

A "secure, comfortable retirement is every worker's dream." SOCIAL SECURITY ADMINISTRATION, DECIDE WHEN TO RETIRE, at http://www.ssa.gov/retire2/index.htm (last visited February 27, 2004). Financial security in retirement depends on the employee's decision and ability to participate in meaningful retirement planning. *Id.*; *see generally* U.S. DEPT. OF LABOR, TOP 10 WAYS TO BEAT THE CLOCK AND PREPARE FOR RETIREMENT, at www.dol.gov/ebsa/publications/10_ways_to_prepare.html (last modified Feb. 27, 2004). Retirement planning is the process by which employees attempt to figure out how much money they will need to live comfortably in retirement. Those employees who participate in retirement planning are "forward-looking in their labor force participation, consumption, and savings decisions," and "have a sense of when they will retire and make tradeoffs . . . in order to accommodate [this] desired standard of living during retirement." CONSTANTIJN PANIS, *et al.*, SOCIAL SECURITY ADMINISTRATION, THE EFFECTS OF CHANGING SOCIAL SECURITY ADMINISTRATION'S EARLY RETIREMENT AGE AND THE NORMAL RETIREMENT AGE 53 (June 2002) (Prepared for SSA by RAND).

In the same manner as employers use pensions as a tool for managing their workforce, employees use pensions as a tool for managing their retirement security. Whether an employee is a participant in a pension plan, under what conditions they are eligible to receive their benefits, and the amount of those

benefits are essential for informed and meaningful retirement planning. Thus, Congress included ERISA's disclosure provisions which require plan administrators to "provide information to plan participants so that they can make rational decisions in planning and saving for retirement." Colleen Medill, *Targeted Pension Reform,* 27 J. LEGIS. 1, 37 (2001). Congress, moreover, made plan sponsors "accountable for the pension benefits they promise to ensure that employees can safely rely on these promises in their retirement planning." *Pension Benefit Guar. Corp. v. Ouiment Corp.*, 711 F.2d 1085, 1092 (1st Cir. 1983); *see also Republic Indus. v. Teamsters Joint Council 83*, 718 F.2d 628, 635 (4th Cir. 1983) (Congress intended "heavy weight to be given to employees' reliance on ultimate realization of their vested benefits"); *In Re Balay*, 113 B.R. 429, 434 (Bankr. N.D. Ill. 1990) ("the Court must remain mindful of the importance of ERISA-qualified plans and their role in retirement planning").

Pensions are always discussed as part of retirement planning with the admonition to "verify information at the time of retirement" and to rely only on written information, not "hearsay." SYLVIA PORTER'S PLANNING YOUR RETIREMENT 17 (1991). In a book published by the International Foundation of Employee Benefit Plans, the author stresses the importance of reading and understanding the individual's pension plan documents. JOHN T. MCCARTHY, FINANCIAL PLANNING FOR A SECURE RETIREMENT 23 (1991). Not surprisingly, advice for retirement planning includes obtaining and reviewing pension plan documents in order to determine the criteria for receipt of a pension and the different distribution options. As one author put it: "You want to avoid nasty surprises come retirement day." JORDAN GOODMAN, EVERYONE'S MONEY BOOK ON RETIREMENT PLANNING, *Pensions* 45 (2002).

Resources for financial planners themselves recognize that pension plans are complicated. Among other issues these resources review are the ability of plan sponsors to change pension plan formulas and the impact of such changes on the amount of benefits that an individual may receive. Significantly, financial planners do not reference the possibility of changes to pension plan benefits after an individual is in pay status. This failure to note even the possibility of a loss of pension benefits after an individual is in pay status is in stark contrast to the information these resources provide concerning retiree health benefits and the recognition that plan sponsors may readily be able to reduce or terminate these health benefits. *See, e.g,* DAVID A. LITTELL, *et al.*, FINANCIAL DECISION MAKING AT RETIREMENT, *Source of Retirement Income: Qualified Retirement Plans* and *Health Insurance Planning for the Older Client* 79-109, 423-425 (5th ed. 2001); *see also* PETER J. STRAUSS AND NANCY M. LEDERMAN, THE COMPLETE RETIREMENT SURVIVAL GUIDE, *Pension, Benefits and IRAs* 283-302 (2d ed. 2003).

Moreover, planning for retirement now necessarily includes working, either full or part-time, during a portion of retirement. Frequently, working during retirement is used as a means for making ends meet or, at a minimum, as a means to prevent an individual from dipping into capital assets. PORTER at 24, 223-24.

Unfortunately, Messrs. Heinz and Schmidt were dealt a nasty surprise after their retirement day. Because the Central Laborers Pension Plan applied changes made to the plan's suspension of benefits rules limiting the types of positions laborer retirees could work after Messrs. Heinz and Schmidt were in pay status, no amount of retirement planning, reading or understanding of their pension plan provisions would have mattered in their case. There would be no way that they should

have, would have or could have known of changes in the plan rules affecting their pension benefits once they were in pay status.

If pension plans can change their plan provisions to apply to a participant who is already in pay status, retirement planning will become meaningless. Not only will a pension participant not be able to rely upon the plan documents, but the pension benefit itself becomes illusory.

II. NUMEROUS EMPLOYEES EXPECT THAT THEY WILL WORK IN RETIREMENT IN ORDER TO MAKE ENDS MEET.

A. Working as Construction Supervisors While Receiving Benefits Earned as Construction Laborers Was Perfectly Permissible at the Time of Messrs. Schmidt and Heinz's Retirement and Should Not Be Disparaged as Double Dipping.

Some *amici* disparagingly refer to Messrs. Heinz and Schmidt's return to work as "double-dipping." National Coordinating Committee for Multiemployer Plans' ("NCCMP") Brief *Amicus Curiae* at 11; U.S. Brief *Amicus Curiae* at 15. As a general rule, "an individual who is retired from service with *the state, a municipal corporation, or a political subdivision of the state*, may not engage in . . . double dipping, where such individual simultaneously receives pension benefits and compensation for postretirement *public* employment or service." 60A AM. JUR. 2D *Pensions and Retirement Funds* § 1226 (2003) (*emphasis added*). *See also, Slavsky v. New York City Police Dep't*, 967 F. Supp 117, 120 (S.D.N.Y. 1997) (the city's failure to restrict pension payments for workers in the private sector did not affect its ability to

"limit expenditures for those whom the public fisc is liable for both the pension and employment benefits"); Lea E. Selleck, *Post-Retirement Employment Restrictions on Public Employees in Kansas*, 5 KAN. J.L. & PUB. POL'Y 199, 208 (Spring 1996) (noting that "restrictions are often not applied to those public workers who secure postretirement employment in the private sector"). A number of state and local governments have anti-double dipping statutes that "prevent a public pensioner who reenters public employment from the simultaneous enjoyment of both the pension and the compensation for subsequent employment." 60A AM. JUR. 2D at § 1226 (2003). At the same time, while the notion of a public pensioner also working for the same public employer may be viewed negatively in the public realm, it is not unusual for private employers to rehire post-retirement workers as consultants or other professionals. Such a practice recognizes that "retirees may be particularly suited to positions calling for great experience." Selleck at 208.

Unlike in the public realm where the person double-dipping is more than likely working in the same job and receiving a pension, the position of construction supervisor is neither covered by the pension plan nor in direct competition with the jobs covered in the plan. As the Seventh Circuit noted, "there is no question that at the time of plaintiffs' retirement, the plan permitted the very practice that the Fund now disparages – working as construction supervisors while receiving benefits." *Heinz v. Central Laborers Pension Fund*, 303 F.3d 802, 806 n.6 (7th Cir. 2002). The practice of working as a construction supervisor while receiving benefits earned as a construction laborer should not be considered "double dipping," with all of the negative connotations of that term, when it was perfectly permissible at the time of Messrs. Heinz and Schmidt's retirement.

B. Messrs. Heinz and Schmidt's Return to Work Is Consistent Both with Employees' Expectations of Working after Retirement and Actual Labor Force Participation Trends.

Messrs. Heinz and Schmidt's decision to work after their retirement is consistent with the upward trend in labor force participation as well as the expectation of employees that they will continue to work after they "retire." Over the past decade, responses in a number of surveys to queries about retirement plans and expectations have been pointing to a shift in work and retirement patterns. Sizable portions of workers report wanting or expecting to work in retirement. "To retire" no longer necessarily means leaving the work force. For example:

- 73 percent of employed respondents aged 51-61 in the first wave of the Health and Retirement Study say that they would like to continue doing some paid work when they retire. NATIONAL INSTITUTE ON AGING, THE HEALTH AND RETIREMENT STUDY, *HRS National Institute on Aging Press Release* (June 17, 1993), available at http://hrsonline.isr.umich.edu/docs/sho_refs.php?hfyle=ref008&xtyp=1 (Go to http://hrsonline.isr.umich.edu/docs/background/ref008a.html (last visited Feb. 26, 2004) (Survey conducted by the University of Michigan Institute for Social Research).

- 72 percent of all workers, 67 percent of preboomers (ages 53 and older at the time of the survey), 69 percent of early boomers (ages 45-52), and 78 percent of late boomers (ages 34-

44) expect to work part time in retirement. EMPLOYEE BENEFIT RESEARCH INSTITUTE, RETIREMENT CONFIDENCE SURVEY (Oct. 1997), available at http://www.ebri.org/rcs/1997/97rcs_es.htm (last visited Feb. 26, 2004) (Survey prepared by Mathew Greenwald & Assocs. in conjunction with EBRI and American Savings Education Council).

- 80 percent of boomers think that they will work at least part time when they retire. AARP, 1998 AARP BABY BOOMER RETIREMENT SURVEY: PRELIMINARY FINDINGS 2 (July 16, 1998) (Prepared for AARP by Roper Starch Worldwide).

- 69 percent of persons aged 45-74 say they want to work in some capacity in retirement. AARP, STAYING AHEAD OF THE CURVE: THE AARP WORK AND CAREER STUDY 8 (Sept. 2002) (Prepared for AARP by RoperASW).

- 95 percent of preretirees aged 55-64 who plan to retire expect to work in some capacity in retirement. Humphrey Taylor, *The New Vision of Retirement is Very Different Than the Traditional Image for Retirement*, THE HARRIS POLL (May 15, 2002), available at http://www.harrisinteractive.com/harris_poll/printerfriend/index.asp?PID=301 (last visited Mar. 1, 2004).

- 66 percent of workers aged 20 and older say that they think they will work for pay after they retire. EMPLOYEE BENEFIT RESEARCH

INSTITUTE, RETIREMENT CONFIDENCE SURVEY 33 (May 2002) (Survey prepared by Mathew Greenwald & Assocs. in conjunction with EBRI and American Savings Education Council).

- 68 percent of workers aged 50-70 plan to work in retirement or expect never to retire. AARP, STAYING AHEAD OF THE CURVE 2003: THE AARP WORKING IN RETIREMENT STUDY 4 (2003) (Prepared for AARP by RoperASW).

Workers' expectations of continuing to work longer and after retirement are consistent with historical and projected labor force participation trends. A review of historical labor force participation rates since 1980 show a slow but steady increase in the number of people age 50 and up participating in the workforce. U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, LABOR FORCE DATA FILES, *Labor Force Participation Rates, 1980-2000*, at http://www.bls.gov/emp/emplab1.htm (Go to ftp://ftp.bls.gov/pub/special.requests/ep/labor.force/clra8000.txt) (last modified Feb. 11, 2004). Projected labor force participation rates for the near term also show a continuing increase. U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, LABOR FORCE DATA FILES, *Labor Force Participation Rates, 2002-2012*, at http://www.bls.gov/emp/emplab1.htm (Go to ftp://ftp.bls.gov/pub/special.requests/ep/labor.force/clra0212.txt) (last modified Feb. 11, 2004). Consequently, suspension of benefits rules that change after participants are in pay status are counter to current labor force participation trends.

C. Individuals Generally Stay in the Work Force and Return to Work After Retirement for Financial Reasons.

Although people stay in the work force or return to work for a variety of reasons, the primary motivating factor is financial – that is, the need for money and access to health care coverage. STAYING AHEAD OF THE CURVE at 8 (2002). Most employees who have been surveyed who remain in the workforce or return to work do so in order to make ends meet. Almost three-fourths of people surveyed expect that they will have to lower their standard of living in retirement. PORTER at 24, 223-24.

Even if an individual is fortunate enough to have earned a pension benefit from a defined benefit pension plan, the purchasing power of such a benefit is reduced yearly if there is no cost of living adjustment. At 3% inflation, the purchasing power of fixed annual pension from a defined benefit pension plan is reduced by about one quarter after 10 years and in half after 23 years.[3/] Obviously, as the inflation rate increases, the purchasing power decreases. SIDNEY DAVIDSON, *et al.*, FINANCIAL ACCOUNTING: AN INTRODUCTION TO CONCEPTS, METHODS, AND USES 850 (4th ed. 1985). *See generally* JANE BRYANT QUINN, MAKING THE MOST OF YOUR MONEY, *How to*

[3/] The Social Security Administration will use 3% for its intermediate Consumer Price Index assumption for years starting in 2007. 2003 ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL OLD-AGE AND SURVIVORS INSURANCE AND THE FEDERAL DISABILITY INSURANCE TRUST FUNDS, tbl. V.B1 (Mar. 2003). Since 1996, the rate of inflation for the Consumer Price Index-Urban has ranged from a high of 3.4 % to a low 1.6%. COUNCIL OF ECONOMIC ADVISORS, ECONOMIC REPORT OF THE PRESIDENT, tbl. B.64 (Feb. 2004).

Retire in Style 842-43, 847, 849 (1997) (discussion of impact of inflation on pension's annual loss of purchasing power and retirement security).

By the time Messrs. Heinz and Schmidt reach age 65, the purchasing power of their pension, assuming an inflation rate of 3%, would be reduced by over half from approximately $1650 per month (Central Laborers' Brief at 4) to approximately $808.50 per month.[4/] Given the loss of purchasing power of their pensions over time, a competent retirement planner would have suggested to Messrs. Heinz and Schmidt that they return to work after they were in pay status.

D. Individuals Who Continue to Work or Return to Work Are Generally Employed in Physically Less Demanding Jobs.

According to the Bureau of Labor Statistics, "[c]onstruction laborers perform a wide range of physically demanding tasks involving building and highway construction, tunnel and shaft excavation, hazardous waste removal, and demolition." U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK, 2002-2003, *Construction Laborers* 449, available at http://www.bls.gov/oco/ocos248.htm (last modified Feb. 27, 2004). These jobs may require the laborers to "lift and carry heavy objects, and stoop, kneel, crouch, or crawl in awkward positions." *Id.*

Not surprisingly, several studies have shown that retirement ages are lower for individuals, such as construction

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[4/] The Central Laborers' Pension Plan provides no annual cost of living adjustment to pension benefits and no actuarial adjustment for the period of the suspension of benefits.

laborers, who work in physically demanding occupations. PANIS at 60. On the other hand, "individuals with flexible work hours and the opportunity to perform less demanding work in the same job tend to retire late." *Id.*

It is rational that an individual would not continue to work in or return to the job of a construction laborer because of the physical demands of that job. A position as a construction supervisor would be less physically demanding than a construction laborer. And, "[e]xperience in many construction laborer jobs may allow some workers to advance to positions such as supervisor or construction superintendent." OCCUPATIONAL OUTLOOK HANDBOOK at 450. Given the physical demands of the job of construction laborers, Messrs. Heinz and Schmidt's decision to return to work as construction supervisors, which at the time of their retirement was permissible under the plan terms, was reasonable.

III. CONGRESS DID NOT DISTINGUISH BETWEEN SINGLE EMPLOYER AND MULTIEMPLOYER PENSION PLANS CONCERNING HOW AND WHEN AMENDMENTS IN PENSION PLAN PROVISIONS MAY BE APPLIED TO PARTICIPANTS IN PAY STATUS.

The offering of pension plans in the United States is voluntary. *See, e.g.*, H.R. Rep. No. 533, 93rd Cong., 1st Sess. 1-2 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4639-40; S. Rep. No. 383, 93rd Cong., 1st Sess. 1 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4890, 4890. Current law neither mandates that a pension be offered to employees nor, if such a plan is offered, the particular types or amounts of benefits that must be provided to employees. A plan sponsor may design the pension plan benefit structure as it sees fit as long as the plan does not

violate any of ERISA's substantive rules.[5/] *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983) (describing how ERISA does not mandate that "employers provide any particular benefits"). Thus, plan sponsors are "generally free" to amend their employee benefit plans at any time. Such amendments may include termination of a pension plan or change in the types or amounts of benefits. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 443-444 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882, 889-91 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995).

Admittedly, pensions can be a useful tool to employers and labor organizations with which they can recruit, retain and manage a labor force. "Because ERISA does not mandate that employers provide pensions to its employees, it must be that 'employers use pensions as personnel devices that alter quit and hiring decisions.'" Lorraine A. Schmall, *Keeping Employer Promises when Relational Incentives No Longer Pertain: "Right-sizing" and Employee Benefits*, 68 GEO. WASH. L. REV. 276, 290 (2000) (*citing* TERESA GHILARDUCCI, LABOR'S CAPITAL at IX (1992)). For example, in order to decrease their work forces and reduce costs, many employers have turned to early retirement incentives, and some have amended their

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[5/] The Central Laborers' Pension Plan was designed to permit a subsidized early retirement benefit based solely on years of credited service with no age requirement. Approximately 16% of blue collar and service employees who are covered by defined benefit plans participate in plans providing an early retirement benefit with no age requirement. U.S. DEPT. OF LABOR, NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN PRIVATE INDUSTRY IN THE UNITED STATES, 2000, Bulletin 2555, tbl. 70 (Jan. 2003) (table showing "Defined benefit plans: Requirements for early retirement, full-time employees, private industry).

existing pension plans to include early retirement windows, which offer benefits during specified, limited periods of time. *See generally*, Schmall, at 293-95. Employers and labor organizations have resorted to service pensions such as the one at issue here to legally push older workers out of the work force and move in and promote younger workers. *Economics of the Aging Revolution: Age Discrimination in the Workplace*, at http://www.trinity.edu/~mkearl/ger-econ.html (last visited Feb. 27, 2004).

Central Laborers' Pension Plan and its *amici* argue that if they cannot apply the changes to the suspension of benefits rules immediately and to all participants, the impact on the economics of the plan and the work force will not be felt immediately. *See* Central Laborers' Brief at 23-26; NCCMP Brief *Amicus Curiae* at 10-11. However, all pension plans have definite parameters in the types of changes Congress permitted and when such changes may be applied to participants. Despite the varying uses of plans as personnel devices, plan sponsors do not have a completely unfettered right to amend their employee benefit plans. No substantive provision of ERISA may be violated, no express term of the plan's governing documents may be violated, and ERISA's procedures for adopting an amendment must be followed. *Izzarelli v. Rexene Products Co.*, 24 F.3d 1506, 1524 (5th Cir. 1994); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1162 (3d Cir. 1990). Congress circumscribed the application of pension plan changes to prevent the reduction of accrued benefits, even though the consequence is that the economic impact of such changes will take a period of time to be effective. By so doing, Congress balanced changes needed for financial reasons and for management of the work force for employers and labor organizations with the impact on the individual.

As an example, "[e]arly retirement windows that are offered year in and year out cause problems for employers and employees when the windows become viewed as entitlements or permanent features of benefit plans." Cathy Ventrell-Monsees, *"Take the Money and Run or It's Too Late Baby:" Early Retirement Incentives and the ADEA*, 29 U. MEM. L. REV. 783, 822 (1999). "[R]egulations [interpreting IRC § 411(d)(6)] preclude a pattern of plan amendments that would make benefits available only for a limited period of time if the plan amendments give rise to a reasonable expectation that the benefit is an ongoing feature of the plan, and therefore a valuable right."[6] Rev. Rul. 92-66, 1992-36 I.R.B. 11. Repeated pension plan amendments to allow for such factors as early retirement windows therefore become "treated as provided under the terms of the plan, without regard to the limited periods of time." *Id.* Congress, thus, balanced permitting employers to use early retirement incentives to decrease their work force with the reasonable expectations of employees if such incentives were used on a regular basis. Likewise, the plan sponsor here should not be able to change the suspension of benefit rules to act as a spigot to manage the flow of unionized workers into the work force at will. *See generally*, Central Laborers' Brief at 23. Instead, Congress' balance must be met.

Another example is where a plan sponsor decides to change its benefit formula in order to reduce costs. Let us assume the following as an illustration:

> A plan sponsor decides to reduce the formula for determining the amount of pension benefits from:

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[6] IRC § 411(d)(6) is the Code counterpart of ERISA § 204(g), 29 U.S.C. § 1054(g).

> 1.5% multiplied by years of service multiplied by the average of the highest 5 years of compensation (the old formula)
> to
>
> 1% multiplied by years of service multiplied by the average of the highest 5 years of compensation (the new formula) (in essence lowering the multiplier).

How would this change in benefit formula be applied to participants who are in pay status? It would not.[7/] Those participants would already have earned their benefits under the old formula. If the new formula were permitted to be applied to those persons who had taken their benefit, the plan would have to recalculate their distribution and ask for a return of monies. This would be particularly troublesome if the participants had received their distribution as a lump sum. Suspending a benefit after benefit distributions have begun is no different than asking for a return of a paid benefit distribution – it's taking money away from a participant in pay status.

This illustration of a change in the benefit formula would apply to all current employees. The plan sponsor has a choice of two methods for determining current employees' benefits after the amendment. Treas. Reg. § 1.401(a)(4)-

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[7/] Decreases in accrued benefits are only permitted if they are made in accordance with ERISA § 302(c)(8), 29 U.S.C. § 1082(c)(8), upon a finding of the Secretary of substantial business hardship and the unavailability or inadequacy of a waiver.

13(c)(4)(i); Treas. Reg. § 1.401(a)(4)-13(c)(4)(ii). *See* Treas. Reg. § 1.401(a)(4)-13(c)(6) for examples. No matter what choice the plan sponsor makes, employees can never receive less than what they have already earned at the time of the change. The changes in benefit formula may only be applied prospectively, not retroactively. *Id.*

As shown above, Congress circumscribed how and when plan amendments would be applied to participants in single employer plans. There is nothing in the statute that shows that Congress intended multiemployer pension plans to be treated any differently than single employer plans in how and when pension plan amendments may be applied to participants. *See Hughes Aircraft*, 525 U.S. at 443-444; *Lockheed*, 517 U.S. at 889-91; *Curtiss-Wright*, 514 U.S. at 80.

Here, the plan amendment tightening the suspension of benefits rule should be treated no differently than an early retirement incentive or a change in a benefit formula. The plan sponsor cannot consistently offer early retirement incentives without such incentives becoming a term of the plan. Likewise, the plan sponsor cannot loosen and tighten its suspension of benefits rules without the least restrictive provision becoming a plan term. Nor can a plan sponsor plan reduce its benefit formula and apply it to those who are in pay status.[8/] Similarly, tightening suspension of rules and applying it to those in pay status acts like change in benefit formula. But just like early retirement incentives and changes in benefit formulas, a plan

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[8/] Although being in pay status provides protection from reductions in benefits, being in pay status may also negatively affect a participant. For example, if a participant chooses a joint and survivor benefit (which generally results in a lower benefit) and the spouse predeceases the participant, the plan has no obligation to recalculate the participant's benefit to pay a higher benefit.

sponsor does have the choice of how to apply the amendment to current employees – it can either apply it only to those years of service after the amendment was passed or apply it so that the employee gets the better benefit under the application of the new suspension of benefit provision. *See* Central Laborers' Brief at 16-17.

Indeed, one of Congress's purposes in enacting ERISA was to ensure that "if a worker has been promised a defined benefit upon retirement . . . he actually receives it." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981). ERISA "seek[s] to ensure that employees will not be left empty handed once employers have guaranteed them certain benefits." *Lockheed*, 517 U.S. at 887; *see also Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 375 (1980). More specifically, by enacting ERISA § 204(g), Congress saw fit to prevent plan sponsors from "pulling the rug out from under" pension plan participants so that participants received the benefit they were promised. *Williams v. Cordis Corp.*, 30 F.3d 1429, 1431 (11th Cir. 1994). If the Court permits a pension plan to apply amendments to tighten eligibility rules to receive pension benefits to participants who are already in pay status, plan sponsors will readily be able to break their promises to employees, totally undermining the purpose of ERISA to provide employees with retirement security. ERISA § 2, 29 U.S.C. § 1001.

CONCLUSION

For the foregoing reasons, AARP urges the Court to affirm the Seventh Circuit's decision.

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Respectfully submitted,

Mary Ellen Signorille
(Counsel of Record)
AARP Foundation Litigation

Melvin Radowitz
AARP

601 E Street, NW
Washington, DC 20049
(202) 434-2060

Counsel for *Amicus Curiae*
AARP